No. 82-5590

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

ERNEST LEE MILLER

Petitioner,

-v-

STATE OF FLORIDA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION FOR CERTIORARI

RICHARD L. JORANDBY
Public Defender

LOUIS G. CARRES
Assistant Public Defender
15th Judicial Circuit of Florida
224 Datura Street/13th Floor
West Palm Beach, Florida 33401
(305) 837-2150

Counsel for Florida Public
Defenders Association

Amicus Curiae

STATEMENT OF INTEREST OF AMICUS CURIAE

The Florida Public Defenders Association, Inc., is a non-profit Florida corporation created for an educational and public purpose comprising the elected Public Defenders of each of the twenty judicial circuits of the State of Florida, and their appointed assistants, who are charged under the State Constitution and law with the responsibility of providing legal representation to indigent criminal defendants. Article V, Section 18, Florida Constitution. Section 27.58, Florida Statutes (1981), provides that "the public defender of each judicial circuit of the state shall be the chief administrator of all public defender services within the circuit

whether such services are rendered by the state or county public defenders."

The Association itself does not provide actual representation in individual cases but coordinates, for the purpose of improving, the work of the Public Defenders in providing the actual legal representation. The Association does participate as amicus curiae on relevant legal issues where it has acquired significant expertise by virtue of its members discharging their responsibility under state law.

The issue amicus has addressed concerns whether the Constitution prohibits a state trial jury's decision of life imprisonment from being overridden by the trial judge who imposed a death sentence notwithstanding

the jury's decision.

Consent to the filing of an amicus curiae brief appears not to be required under Rule 36.4, as it is filed by, and on behalf of, the Association, comprising Florida's Public Defenders. The written consent of the petitioner, whose petition is supported by amicus, has been lodged with the Clerk. The respondent has withheld its consent. A motion for leave to file follows next herein in the event it is deemed necessary.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The Florida Public Defenders Association, Inc., a non-profit Florida corporation, respectfully seeks leave to file its brief as amicus curiae. Pursuant to Rule 36.1 it is shown that the brief of amicus curiae has been prepared by the Florida Public Defenders Association, Inc., a non-profit, voluntary organization of Public Defenders, and their assistants, in the twenty judicial circuits of the State of Florida. The Public Defenders are constitutional and state officers under Florida law who are charged with the responsibility of representing indigent criminal defendants in the State of Florida.

The brief of amicus curiae

supports the position of the petitioner, who has supplied written consent to filing of the amicus curiae brief, although consent to the filing may not be required by Rule 36.4. The respondent has withheld its consent.

The interest of amicus is to present the issue of whether specific provisions of the Constitution bar a state from overruling of a jury's finding of fact, under instruction of law, that death is not the appropriate sentence. The amicus, because of the unique nature of the practice, has become especially knowledgeable of the issue. (See Appendix B).

Amicus presents considerations relevant to the Court's determination of the cause because amicus has extensively studied the question as a result of its

members discharging their responsibility under state law. Because of this experience, participation by amicus will aid the concise consideration of the questions before the Court that are relevant to disposition of the petition which the individual parties otherwise would be unable to do.

Wherefore, amicus curiae respectfully requests leave to file its brief as amicus curiae in this cause.

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SUMMARY OF ARGUMENT

Under the procedure utilized in Florida, a trial judge may override a jury's finding made at the penalty phase of trial that death is not the appropriate sentence. Amicus urges review of the question whether a death sentence may be imposed by a trial judge in such case under Bullington v. Missouri, 451 U.S. 430 (1981).

The overwhelming national practice under post-Furman capital penalty statutes rejects such death sentences. The national concensus has rejected such death sentences for at least thirty years as is demonstrated in the appendices to the brief of amicus.

A comparison between capital versus non-capital sentencing supports the contention that when a jury has

been provided, and returns a verdict favorable to the accused on a factual issue essential to the sentencing decision, that Bullington v. Missouri, supra, requires finality of that decision. The Court, having granted certiorari review in Estelle v. Bullard, Case No. 81-1774, should also consider the application of Bullington's principles to the Florida practice.

Regardless of whether a jury's consent may be constitutionally required for imposition of a death sentence, as well it might under the analysis of McKeiver v. Pennsylvania, 403 U.S. 528 (1971), the imposition of the death sentence contrary to the decision of a jury involves federal constitutional questions of special

importance to the fair administration of the death penalty which should be settled by this Court.

STATEMENT OF AMICUS CURIAE REGARDING WHY THE WRIT OF CERTIORARI SHOULD BE ISSUED TO REVIEW QUESTIONS PRESENTED BY THIS CASE

In Kepner v. United States, 195 U.S. 100 (1904), Justice Brown stated, dissenting:

> Under our Anglo-Saxon system of jurisprudence I have always supposed that a verdict of acquittal upon a valid indictment terminated the jeopardy, that no further proceedings for a review could be taken either in the same or in an appellate court, and that it was extremely doubtful whether even Congress could constitutionally authorize such review.

In this case the Court is being asked to decide whether the State of Florida may empanel a jury to determine facts on which the life or death of the accused will depend and may then overturn the jury's findings of fact that death is not the appropriate

punishment.

This case presents the unique issue of whether a state legislature may now compromise the integrity of a jury deciding life or death in a manner which Justice Brown doubted that Congress could authorize in trials of guilt or innocence.

In Bullington v. Missouri, 451 U.S. 430 (1981), this Court clearly established that a comparison of the determination of guilt with the determination of life or death is not a mere poetic metaphor. As this Court stated in unequivocal and unqualified language, see 451 U.S. at 445:

> A verdict of acquittal on the issue of guilt or innocence is, of course, absolutely final. The values that underlie this principle... are equally applicable when a jury has rejected the

> State's claim that the defendant deserves to die....

Under the procedure utilized in Florida, "the statute leaves the trial judge free to reject the jury's recommendation, (and) the Florida Supreme Court has developed a strict standard of review in cases where a judge imposes the death penalty in the face of a jury recommendation favoring life imprisonment." Proffitt v. Wainwright, ___F.2d___, slip opinion at 2700 n. 11 (11th Cir. Case No. 80-5997 September 10, 1982), citing to Tedder v. State, 322 So.2d 908, 910 (Fla. 1975). In Tedder, id., the standard was iterated, viz.:

> In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually

no reasonable person could differ.

Such a legal fiction must erode society's trust in both the legitimacy of death penalty decisions and the inviolability of the jury system.[1] Invasion of the fact finding and weighing function of the jury is what is occurring in determinations in Florida on one of the most sensitive issues a jury can be called upon to make in our system of justice. A

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1. The impossibility of impeaching a jury verdict for the accused is a basic fact of our system. See, e.g., United States v. Moylan, 417 F.2d 1002, 1006 (4th Cir. 1969) (the court "cannot search the minds of the jurors to find the basis upon which they judge."); McDonald v. Pless & Winborne, 238 U.S. 264 (1915) (jurors may not impeach their own verdict). See also, United States v. Crouch, 566 F.2d 1311, 1315-1316 (5th Cir. 1978), and United States v. D'Angelo, 598 F.2d 1002, 1004 (5th Cir. 1979).

disproportionate impact of the procedure has been demonstrated by the six-year study reported by L. Foley, Florida After the Furman Decision: Discrimination in the Imposition of the Death Penalty (paper prepared at the University of North Florida), summarized in S. Gillers, Deciding Who Dies, 129 U. of Penn. L. Rev. 1, 67-68, n. 318 (1980). (See Appendix A, attached hereto.)

In view of Bullington's equation of guilt and penalty phases of a capital trial, it is notable that the actual tendency of trial judges to exercise their power in favor of death, rather than in favor of life, is strikingly parallel to the inclination of judges to convict where a jury would acquit rather than vice versa. A

study referred to with approbation in Duncan v. Louisiana, 391 U.S. 145 (1968), at 157 nn. 24 and 26, revealed very similar jury-judge disagreement on the issue of guilt. Appendix A shows that the jury functions at capital penalty trials in Florida very much as the jury functions at the guilt phase of criminal trials. In Ballew v. Georgia, 435 U.S. 223 (1978), this Court utilized purely experimental simulations of jury behavior in interpreting the constitutional integrity of a criminal jury. Id. at 231-239 and nn. 10, 32.

In this case, however, Florida has actually become a living laboratory proving the hypothesis that the power to overrule a jury's decision for the accused is the power to

disproportionately impose the death penalty contrary to the will of the community itself which was expressed by the verdict of the jury.

In authorizing the override of a jury's decision against death, Florida departs from a near-unanimous national practice of finality for such jury decisions. (See Appendix B, attached hereto.) This national concensus has persisted over at least the past thirty years when at no time since 1948 have more than three American jurisdictions authorized the rejection of a jury's determination for mercy in a capital case. Under the clear precedent of this Court, constantly reiterated in recent death penalty decisions, such overwhelming national rejection of a procedure for imposing

the ultimate penalty must at least raise serious doubts as to its constitutionality.[2]

The invalidity of Florida's procedure is further indicated by the extreme infrequency of actual executions after jury recommendations for mercy even in the few states

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2. Enmund v. Florida, ___U.S.___, 102 S.Ct. 3368 (1982) (death sentence unconstitutional for defendant who neither took nor intended to take human life); Coker v. Georgia, 433 U.S. 584 (1977) (death penalty disproportionate for rape of adult where life not taken); Roberts v. Louisiana, 428 U.S. 325 (1976) (mandatory death sentence rejected by overwhelming national tradition). See also, Duncan v. Louisiana, supra, (jury trial clause interpreted in light of national practice), and McKeiver v. Pennsylvania, 403 U.S. 528 (1971) (jury trial not required in juvenile cases under due process clause when great majority of states reject such procedure in delinquency determinations).

which have permitted such a practice.[3] In addition to the Utah cases shown in Appendix C, knowledgeable commentators have stated that under the pre-1963 New York law, trial judges almost "invariably" followed jury recommendations of mercy. See Togman, The Two-Trial System in Capital Cases, 39 N.Y.U.L. Rev. 50, 75 n. 171 (1964). The death sentence left intact in Williams v. New York, 337 U.S. 241 (1949), was commuted to life based in part on the jury's recommendation.

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3. See Appendix C, attached hereto, and Enmund v. Florida, supra, (extreme infrequency of executions of defendants who neither took nor intended to take life indicates unconstitutionality); Furman v. Georgia, 408 U.S. 238 (1972) (extreme infrequency of executions indicates arbitrariness of results when death penalty applicable to broad categories of homicide for which juries rarely impose it).

See Message of the Governor of New York, November 16, 1949, N.Y. Leg. Doc. (1950) no. 10, pp. 13-14, quoted in Michael and Wechsler, Criminal Law and Its Administration (1956 Supp.) 55.

The Florida Supreme Court has interpreted Furman to require the overruling of juries. See Douglas v. State, 373 So.2d 895, 897 (Fla. 1979), where the court held that finality of jury life determinations would "place our statute in contravention of the directives of the United States Supreme Court." This misunderstanding of Furman persists even after the decision in Lockett v. Ohio, 438 U.S. 586, 599-600, nn. 7-8 (1978), where restriction of consideration of mitigating factors was held to be unconstitutional. See Johnson v.

State, 393 So.2d 1069, 1074 (Fla. 1980):

> [A]cceptance of defendant's assertion would place our present death penalty statute in contravention of the United States Supreme Court's directives in Furman..., since to accept his argument would mean that a trial judge and this Court would be bound by the jury's recommendation of life.

The Petitioner, Ernest Miller, was sentenced to death "notwithstanding the jury's recommendation" because the trial court concluded "that Miller clearly deserved the death penalty." Miller v. State, 415 So.2d 1262, 1263 (Fla. 1982). In its affirmance the Florida Supreme Court held, id. at 1264:

> The standard set out in Tedder v. State, 322 So.2d 908, 910 (Fla. 1975), has been met in this case. On the totality of the circumstances virtually no reasonable person could differ on the appropriateness of the death penalty. See Johnson v. State, 393 So.2d

> 1069 (Fla. 1980). We agree that the disparity in the recommended sentences is not warranted. See Barclay v. State, 343 So.2d 1266 (Fla. 1977), cert. denied, 439 U.S. 892, 99 S.Ct. 249, 58 L.Ed.2d (1978).

Yet, in Johnson v. State, supra, the Florida Supreme Court divided four to three on whether reasonable persons could differ, with Chief Justice Sundberg stating the view, id. at 1075, that reasonable persons could conclude it was not the type of crime for which the death penalty is applicable. Moreover, in Barclay v. State, 343 So.2d 1266 (Fla. 1977), Justice Boyd stated that the jury "was correct", id. at 1272, not merely reasonable in assessing the relative circumstances in that case.

The Fifth Circuit has observed in Spinkellink v. Wainwright, 578 F.2d 582, at 605 (5th Cir. 1978) that:

> [R]easonable persons can differ over the fate of every criminal defendant in every death penalty case.

When Florida's use of the reasonable doubt standard indicates that in a capital sentencing proceeding, it is the state, not the defendant, that should bear "almost the entire risk of error", see Bullington at 446, such necessarily uncertain speculation as to the "reasonableness" of a jury's decision against the state's power of death seems utterly inappropriate. In a decision where society's vital concern demands the appearance as well as the reality of fairness, it seems shocking for the Florida Supreme Court to brand a jury's recommendation based on findings of fact against death as "unreasonable" when members of that tribunal differ among themselves on the ultimate issue,

as indeed reasonable people may differ in every capital case.

Based upon precepts established by this Court, it is not necessary to establish a requirement for jury participation in capital sentencing in order to constitutionally safeguard the integrity of a jury where a state has provided for a jury by law and has participated in selecting the citizens who pass upon the sentencing issues. See Taylor v. Louisiana, 419 U.S. 522 (1975) (state cannot compromise a jury which the state has purported to provide); Bullington v. Missouri, supra, (jeopardy final when jury proceeding resulted in verdict favorable to accused although it was not necessary to reach the question reserved in Lockett, supra, at 609 n. 6, of whether jury

participation is constitutionally required in capital penalty decisions).

When Florida itself purports to provide a penalty phase jury acting as "the conscience of our communities", McCaskill v. State, 344 So.2d 1276, at 1280 (1977), it is "but a short step" to expect the same absolute finality for a jury's decision in favor of the life of the accused that applies in trials of guilt. See Witherspoon v. Illinois, 391 U.S. 510, 521 (1968).[4]

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4. Neither Proffitt, nor Dobbert v. Florida, 432 U.S. 282 (1977), directly address nor decide issues crucial to the question now before the Court. In Proffitt v. Florida, 428 U.S. 242, at 254 n.11 (1976), it was explained that "the claims of vagueness and overbreadth in the statutory criteria" were reviewed only as necessary to determine whether the system in its entirety presented a substantial risk of arbitrariness. Also in Zant v. Stephens, ___U.S.___, 102 S.Ct. 1856 (1982), it was noted that the review of the

This Court has granted certiorari to review a similar question in Estelle v. Bullard, Case No. 81-1774, decided by the Fifth Circuit Court of Appelas in Bullard v. Estelle, 665 F.2d 1347 (1982). The present case, unlike Bullard, involves the application of principles applied in Bullington to death penalty proceedings, and it would be appropriate to grant certiorari in the present case to consider this question.

While in McKeiver v. Pennsylvania, 403 U.S. 528 (1971), this Court rejected a jury trial requirement in

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4. (con't) statute in Gregg "did not lead us to examine all of its nuances." 102 S.Ct. at 1857. Likewise in Dobbert, the Court reviewed an ex post facto question.

juvenile delinquency cases, the Court articulated some important considerations in deciding whether trial by jury is required in various types of proceedings under the Sixth Amendment or by the Fourteenth Amendment Due Process clause. While McKeiver may well indicate a constitutional requirement for jury participation and consent in the decision to impose the death penalty, at the very least it strongly suggests that overturning a jury's sworn findings of fact against the death penalty violates due process.

In rejecting the jury trial requirement in McKeiver for delinquency proceedings, the Court repeatedly emphasized the benevolent, rehabilitative, non-punitive and

paternalistic nature and goals of the juvenile process. No more stark contrast to the juvenile justice system could exist than the administration of capital punishment in its utter rejection of rehabilitation. See Lockett v. Ohio, supra, at 604-605, and Gardner v. Florida, 430 U.S. 349, at 356 (1977). The juvenile system, by its benevolent approach, minimizes the risk for abuse while allowing for public opinion and periodic re-evaluation of an offender's treatment to correct any potential excess, yet the death penalty's exclusion of such corrective mechanisms indicates the need for absolute finality when a jury has rejected the irrevocable punishment of death.

CONCLUSION

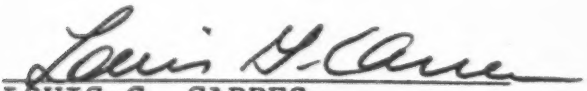
This Court in Parsons v. Bedford, 3 Pet. 433, at 446 (1830), has stated that:

> The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy.

Since these momentous issues, which are of special importance in light of Bullington v. Missouri, supra, have not beenresolved as they pertain to the Florida practice, amicus believes a writ of certiorari should issue to review these questions of crucial importance to the fair administration of the ultimate sanction of death.

Respectfully submitted,

RICHARD L. JORANDBY
Public Defender



LOUIS G. CARRES
Assistant Public Defender
15th Judicial Circuit of
Florida
224 Datura Street/13th Floor
West Palm Beach, Florida
33401
(305) 837-2150

Counsel for Amicus Curiae:
Florida Public Defenders
Association

CERTIFICATE OF SERVICE

I, LOUIS G. CARRES, do hereby certify that service of three (3) true copies hereof, including the appendix, has been made upon all parties required to be served, by depositing same in the U.S. Mail, postage prepaid, addressed to:

(1) Michael Sandler, Esq.
Steptoe & Johnson
Attorneys at Law
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036
Attorney for Petitioner

and by U.S. Mail, postage prepaid, addressed to:

(2) Michael J. Kotler, Esq.
Assistant Attorney General
Park Trammell Building, 8th Floor
1313 Tampa Street
Tampa, Florida 33602
Attorney for Respondent

this 16th day of November, 1982.

LOUIS G. CARRES
Attorney for Amicus Curiae

JUDGE/JURY CAPITAL PENALTY DISAGREEMENT
IN 21 FLORIDA COUNTIES
1972-1978

When Judge and/or Jury Find(s) For Death Penalty in percentages

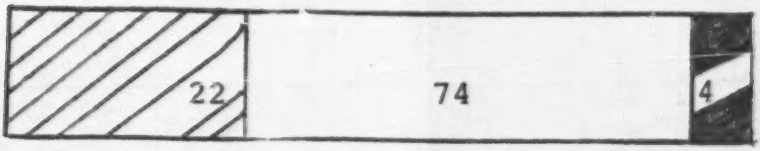
	28	66	6
Jury:	life	death	death
Judge:	death	death	life

NOTE: This chart is based on a survey of all 79 cases in 21 of the 67 Florida counties during the period 1972-1978 where the penalty jury and/or the trial judge reached a verdict or sentence of death. The data is reported in L. Foley, Florida After the Furman Decision: Discrimination in the Imposition of the Death Penalty (unpublished paper at the University of North Florida), and is summarized in S.Gillers, Deciding Who Dies, 129 U. of Penn. L. Rev. 1, 67-68 n. 318 (1980).

This data does not include cases where the accused waived a penalty jury.

Table 10

Judge-Jury Disagreement on Issue of Guilt
When either or both convict
in percentages

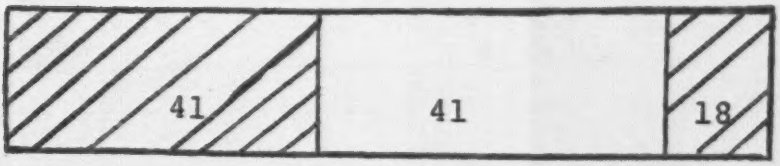


Jury:	not guilty	guilty	guilty
Judge:	guilty	guilty	not guilty
		Judge and Jury Disagree	

Source: H. Zeisel, Some Data on Juror Attitudes Towards Capital Punishment 36 (1968). Table based on survey of trial judge's hypothetical verdict if (s)he had tried case alone (where jury was actual trier of guilt or innocence). Data based on both capital and noncapital cases studied in H. Kalven, Jr. and H. Zeisel, The American Jury (1966).

Table 11

Judge-Jury Disagreement on the Death Penalty
When either or both impose it
in percentages



Jury:	prison	death	death
Judge:	death	death	prison
	Judge and Jury Disagree		

Source: H. Zeisel, Some Data on Juror *Attitudes Towards Capital Punishment* 37 (1968). Table based on survey of trial judge's hypothetical verdict on penalty if (s)he had tried case alone, in capital cases where jury was trier of fact and had discretion to choose between death and imprisonment.

JUDGE/JURY ROLES IN CAPITAL PENALTY DETERMINATION

A Survey of National Legislative Practice
1972-1981

1. Jury Life Verdict Binding

ARKANSAS	Crim. Code (1977) §41-1301 & §41-1302	L
CALIFORNIA	Penal Code (1979) §190.3-190.4	U
COLORADO	Rev. Stats. (1979 Cum.Supp.) §16-11-103	L
CONNECTICUT	Gen. Stats. Ann. (1979 Pck.Pt.) §53a-46a	U
DELAWARE	Code Ann. (1977 Cum.Supp.) §11-4209	L
GEORGIA	Code Ann. (1977) §26-3102, §27-2302	L
ILLINOIS	Ann. Stats. (1979) §38-9-1	L
KENTUCKY	Rev. Stats. (1978 Cum.Supp.) S532.025 #	U (?)
LOUISIANA	Code of Crim. Proc. (Pck.Pt. 1979) Art. 905.8	L
MARYLAND	Ann. Code (1978 Cum.Supp.) Art. 27, §413	L
MASSACHUSETTS	1979 Chapter 488, §55	L
MISSISSIPPI	Code (1978 Cum. Supp.) §99-19-101	L
MISSOURI	Crim. Code (1979 Spec. Pamph.)	L

MISSOURI (con't)	§565.006	
NEVADA	Rev. Stats. (1977) §175.554	U
NEW HAMPSHIRE	Rev. Stats. Ann. (1977 Supp.) §630.5	L
NEW MEXICO	Stats. Ann. (1979 Supp.) 31-20A-3	L
NORTH CAROLINA	Gen. Stats. (1978) §15A-2000	L
OHIO	Rev. Code (1981 Legislation, File 60) §2929.024(D)(2)	L
OKLAHOMA	Stats. Ann. (1978-1979 Pck.Pt.) §21-701.11	L
PENNSYLVANIA	Act No. 1978-141: §18-1311	L
SOUTH CAROLINA	Code. Ann. (1978 Cum.Supp.) §16-3-20	L
SOUTH DAKOTA	State Laws 1979 Chapter 160: S23A-27A-4	L (?)
TENNESSEE	Code Ann. (1978 Cum.Supp.) §39-2404	L
TEXAS	Code Crim.Proc.Art. 37.071	T
UTAH	Crim. Code (1978) §76-3-207	L
VIRGINIA	Code (1979 Cum. Supp.) §19.2-264.4	L

WASHINGTON	Rev. Code Ann. (1978 Pck.Pt) §10.94.020	U (?)
WYOMING	Stats. (1977) §6-4-102	L
UNITED STATES	49 USC §1473 (1976) (Antihijacking Act)	U

2. Jury Life Verdict Not Binding

ALABAMA	Senate Bill 241, §§8-9 (1981)	A
FLORIDA	Stats. Ann. (1977) §921.141	M
INDIANA	Stats. Ann. (1979) §35-50-2-9	U

3. Penalty Determination by Judge(s) Alone

ARIZONA	Rev. Stats. Ann. (1978 Supp. Pamph) §13-454
IDAHO	Code (1978 Cum. Pck.Supp.) §19-2515
MONTANA	Rev. Codes (1977 Unterim Supp.) §95-2206.6
NEBRASKA	Rev. Stats.(1975) §29-2520
OREGON	Rev. Stats. (1979) §163.116 *

LEGENDS AND NOTATIONS

L---Life sentence unless jury unanimously agrees on death
U---Unanimous verdict required for

either life or death
M---Simple majority suffices for verdict of either life or death
A---Alabama system: 10 jurors required for death, 7 jurors required for life

T---Unique Texas procedure: penalty jury answers special questions on deliberate nature of murder, probability defendant would engage in future acts of dangerous violence, and (if raised) lack of provocation by victim. 12 jurors required to answer "yes" to each question for imposition of a death sentence; 10 jurors suffice to answer any question "no" and prevent death sentence.

The Kentucky statute is not absolutely clear in its language concerning the finality of a jury decision against death, but in Gall v. Commonwealth, 607 S.W.2d 97, 104 (Ky. 1980) the Supreme Court of Kentucky construed the statute to require a jury finding of at least one aggravating circumstance in the penalty phase before the judge may consider imposing the death penalty. Since the statute calls for written findings of aggravating circumstances by the jury only "if its verdict be a recommendation of death," see Kentucky Rev. Stats. (1978 Cum.Supp.) §532.025 (3), it appears that a jury life decision is in effect binding under the Kentucky scheme.

* Oregon death penalty statute declared unconstitutional by the Supreme Court of Oregon in State v. Quinn, 623 P.2d 630 (or. 1981) on ground that "deliberateness" of capital murder a fact to be determined by the trial judge alone in the penalty phase denied an accused the right to trial by jury.

(?) The Kentucky statute as interpreted by the Supreme Court of Kentucky requires a unanimous jury verdict for death, but the consequences of a jury's failure to agree on the penalty issue are not defined. The Connecticut and South Dakota statutes do not specifically state a unanimity requirement on penalty, but it is fairly assumed; the Washington statute does not specify the result if the jury fails to agree on the penalty issue.

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OVERALL CATEGORIES

JURY LIFE VERDICT BINDING----------	29
JURY LIFE VERDICT NOT BINDING---------	3
PENALTY DETERMINED BY JUDGE(S) ALONE--	5
TOTAL JURISDICTIONS	37

PRACTICES WHERE JURIES PARTICIPATE IN DETERMINING PENALTY

JURY RESULT FOR LIFE IMPRISONMENT BINDING ----------	29
JURY RESULT FOR LIFE IMPRISONMENT NOT BINDING ----------	3
SUBTOTAL OF JURISDICTIONS WITH JURY PARTICIPATION	32

****

RULES ON JURY PENALTY VOTE

LIFE IMPRISONMENT UNLESS JURY UNANIMOUS FOR DEATH (L)	22
UNANIMITY REQUIRED FOR EITHER LIFE OR DEATH (U)	7*
10 JURORS REQUIRED FOR DEATH, 7 FOR LIFE (A)	1*
SIMPLE MAJORITY SUFFICES FOR LIFE OR DEATH (M)	1*
TEXAS PROCEDURE--SPECIAL PENALTY QUESTIONS (T)	1
SUBTOTAL OF JURISDICTIONS WITH JURY PARTICIPATION	32

*(U) includes Indiana (life decision not binding); (A) includes only Alabama (life not binding); (M) includes only Florida (life not binding). However, the majority rule in Florida is not connected with the nonbinding nature of a life decision under the 1972 statute, since during the period 1872-1972 the same majority rule prevailed but the jury's life decision was final under state law.

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METHOD OF STUDY: This survey includes the latest discretionary death penalty statute passed in each jurisdiction since Furman v. Georgia, 408 U.S. 238 (1972).

THIS SURVEY BASED ON BEGISLATIVE INFORMATION AVAILABLE TO DECEMBER 22, 1981

UTAH EXECUTIONS AND DEATH SENTENCES
JURY RECOMMENDATIONS

Previous to the decision of Furman v. Georgia, 408 U.S. 238 (1972), the State of Utah had a death penalty statute which made the ultimate penalty mandatory unless the jury recommended mercy, and in cases where the jury did recommend mercy extended discretion to the trial judge to impose a penalty of death or of life imprisonment. It may be noted that under Utah law death was the normal penalty for first degree murder, and life imprisonment the exception which thus required agreement by both judge and jury.

There follows a list of every defendant whose death sentence was executed in Utah between 1948 and 1967 (when a moratorium on executions began which was to last nationwide for 10 years

while federal constitutional questions were being resolved).

Also, there are listed reports of two Utah cases (in 1941 and 1951) where a death sentence was sustained by the Utah Supreme Court after a jury recommendation of mercy, but was not carried out.

The records show that at least since 1948, there were no executions in Utah after jury recommendations of mercy.

DEFENDANTS EXECUTED IN UTAH
1948-1967

Name - Date of Verdict	Dist.Ct.# and Appellate Report
1. Mares, Elisio J. Executed - 9/10/51 Verdict - March 7, 1947	Summit Cnty. 3rd Dist.Ct. #420 State v. Mares, 192 P.2d 861 (Ut. 1948)

Name - Date of Verdict	Dist.Ct.# and Appellate Report
2. Gardner, Ray Dempsey - Executed - 9/29/51 Verdict - Dec. 13, 1949	Weber Cnty. 2nd Dist.Ct. #4803 State v. Gardner, 230 P.2d 559 (Ut. 1951)
3. Neal, Don Jesse Executed - 7/1/55 Verdict - (see note)	(see note) State v. Neal, 262 P.2d 756, 759 (Ut. 1953) Utah S. Ct. noted lack of jury mercy recommendation id. at 759.
4. Braasch, Vern A. Executed - 5/11/56 Verdict - Dec. 9, 1949	Iron Cnty. 5th Dist.Ct. #171 State v. Braasch, 229 P.2d 289 (Ut. 1951)
5. Sullivan, Melvin L. Executed - 5/11/56 Verdict - Dec. 9, 1949	Same as Braasch (co-defendant) Sub nomine Braasch
6. Kirkham, Barton K. Executed - 6/7/58 Verdict - (see note)	(see note) State v. Kirkham, 319 P.2d 859, 862 (Ut. 1958). Absence of jury mercy recommendation

6.	Kirkham (con't)	noted in opinion, id. at 862.
7.	Rodgers, James W. Executed - 3/30/60 Verdict - Dec. 14, 1957	San Juan Cnty. 7th Dist. Ct. Crim. #243 State v. Rodgers, 329 P.2d 1075 (Ut. 1958)

NOTE: In two cases, those of Neal and Kirkham, the opinion of the Utah Supreme Court itself mentions the choice of the jury for a verdict of first degree murder without rather than with a recommendation of mercy; thus only the appellate citation is given for these cases. Information on the other five cases was obtained from the relevant Judicial District Courts of Utah, where the defendants were tried. In each of these cases, trial records revealed a jury verdict of first degree murder without recommendation for mercy. This is especially striking because customarily Utah juries were provided with separate verdict forms for each possible decision, including guilty of first degree murder with a recommendation for life imprisonment.

DEFENDANTS WITH DEATH SENTENCES AFFIRMED IN UTAH AFTER LIFE RECOMMENDATIONS WHO WERE NEVERTHELESS NOT EXECUTED (THIS LIST IS NOT NECESSARILY EXHAUSTIVE, ALTHOUGH THERE IS NO SPECIFIC INDICATION THAT OTHER CASES EXIST).

Name	Appellate Opinion Aff'g Sentence & Date Commuted
1. Markham, John	State v. Markham, 112 P.2d 496, see 496-497 (Ut. 1941). June, 1941
2. Matteri, Fred	State v. Matteri, 225 P.2d 325, see 329-330 (Ut. 1950). June 11, 1951

NOTE: Commutation dates based on records of Utah State Prison, which also confirm that the list of executions taken above from Bowers, Executions in America 385 (1974) is in fact accurate and complete. The records merely say "commuted," giving no details. However, the Utah State Archives are now researching for the existence of any public clemency documents in these cases.